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~~In the Supreme Court of the United States~~ States

~~October Term, 1924~~

No. 362

LACGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims has not yet
been officially reported, but will be found at page
45 of the record.

~~The petition for writ of certiorari was entered~~ as entered
~~January 2, 1926 (1926)~~ on for writ
~~of certiorari was filed May 3, 1926 (1926)~~ (7), under
the provisions of the Act of February 13, 1925,
Chap. 229, 43 Stat. 926.

THE QUESTION

The question presented is whether the United States should pay, for tobacco products obtained by the United States from the petitioner, the value of the tobacco products at the date they were delivered to the United States, or that value plus interest thereon from the date of delivery to the date of payment, and this, in turn, depends upon whether the tobacco products were obtained by the United States through the exercise of the power of eminent domain or under a contract with the petitioner to pay the reasonable value at the date of delivery.

STATEMENT

On August 26, 1918, Navy Order No. N-4128 was sent by the Navy Department to the petitioner. (R. 29-32.) The order provided (R. 29, 30):

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a

precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

Thereafter followed paragraphs with respect to deliveries and bills and a statement of the number and kind of tobacco products required, together with a list of the provisional prices for the tobacco products mentioned in the said order. (R. 31, 32.)

On the reverse side of the printed form appeared extracts from the Acts of March 4, 1917 (c. 180, 39 Stat., 1168, 1193), and June 15, 1917 (c. 29, 40 Stat. 182). (R. 33.)

There was also on the reverse side of said printed form certain "conditions" having to do with specifications, inspection, payments, deliveries, patent rights, etc. (R. 34, 35, 36.)

The pertinent provisions of the Acts of March 4, 1917, and June 15, 1917, referred to in this order, are printed in the appendix to this brief. These statutes authorized the President in time of war

to issue orders for war materials compliance with which would be "obligatory," and authorized the President to requisition and take over the output of any factory, and authorized the President to take possession of and seize such material if the obligatory order was not complied with, and provided further that the material should be taken at such reasonable price as should be determined by the President, but if the person from whom the material was obtained was not satisfied with that price part of it should be paid on delivery, and the person furnishing the material should be permitted to bring suit for such additional amount "as will be just compensation therefor" in the Court of Claims.

On August 31, 1918, the petitioner by written endorsement on said order stated that the same "is accepted, subject to the conditions in subparagraph (b) above," thus indicating that it would comply with the order, but rejected the price named. There were three modifications of this order, on September 9, 1918 (R. 37), on October 14, 1918 (R. 37), and on November 22, 1918 (R. 37, 38), which were accepted by the petitioner. Pursuant to the arrangement thus disclosed, the petitioner delivered between September 9, 1918, and November 23, 1918, to the Navy Department, and between September 30, 1918, and November 22, 1918, to the Marine Corps,

large quantities of different brands of tobacco, which, at the provisional prices stated in said order and modifications, amounted to the sum of \$423,-893.96. At the time of the deliveries of the tobacco, the petitioner invoiced the same in the aggregate sum of \$483,504.30, which the Court of Claims found (R. 38) was the fair and reasonable value. The Government paid on account as the tobacco was delivered the amounts of the provisional prices, and thereafter, in 1924, the petitioner brought suit in the Court of Claims to recover the difference between the amount paid and the fair and reasonable value of the tobacco at the time of delivery, which difference amounted to \$59,610.34, "together with just compensation or damages for the detention thereof." (R. 8.) The suit was based on the theory that the tobacco had been delivered in obedience to the exercise of the power of eminent domain and that "this petitioner is entitled to just compensation which is the monetary equivalent of its property as of the time of the taking or requisition thereof." (R. 7.)

The Court of Claims entered judgment for the petitioner in the sum of \$59,610.34, which was found to be the difference between the reasonable value of the tobacco at the time it was delivered and the amount heretofore paid, but refused to allow the petitioner any interest from the date of delivery of the tobacco to the date of the judgment.

ARGUMENT

The only question in this case is whether the tobacco was taken by the United States through the exercise of the power of eminent domain entitling the tobacco company to just compensation under the Fifth Amendment, as defined in the case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, or whether the tobacco was delivered under an express contract to pay the reasonable value thereof at the time of delivery, and which did not expressly provide for interest to date of payment, which would prevent the petitioner, under Section 177 of the Judicial Code (which provides that no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest), from recovering interest for the period from the date of the delivery of the tobacco to the date of payment therefor.

The Court of Claims, in a well-considered opinion, indicates its view that if this tobacco was obtained through the exercise of the power of eminent domain the petitioner would be entitled to the unpaid portion of the value at the date of the delivery of the tobacco plus interest thereon to the date of payment, for the reason that the statutes referred to in the order for tobacco authorized one whose property was requisitioned or taken under the power of eminent domain to sue in the Court of

Claims for "just compensation," in which case, under the rule laid down in the *Seaboard Air Line Railway Company case*, Section 177 of the Judicial Code, forbidding the Court of Claims to award interest, would not apply.

The Court of Claims concluded, however, that there was no requisition or taking of the tobacco under the power of eminent domain; that the tobacco was voluntarily delivered under an express contract which did not expressly provide for the payment of interest; that the jurisdiction of the Court of Claims was founded on Section 145 of the Judicial Code, allowing it to entertain suits on express or implied contracts, and not on the provisions of the Acts of March 4, 1917, and June 5, 1917, above referred to, authorizing it to entertain suits for just compensation, and that it was prohibited from allowing interest by virtue of Section 177 of the Judicial Code.

The question presented, therefore, is whether under the circumstances of this case there was a taking or requisition under the power of eminent domain, or a voluntary sale under contract. It must be conceded that the question is not settled by the decision in the case of *American Smelting and Refining Company v. United States*, 259 U. S. 75. In that case the order for merchandise did not state that compliance with it was obligatory, and made no reference to statutes authorizing the United States to requisition property, as did the naval

order in the present case. The order in the *American Smelting Company case* also specified a price of 23½ cents a pound for copper, and the Smelting Company not only agreed to deliver the copper as specified in the order, but agreed to the price fixed in the order. The Court said (p. 78):

The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did not discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered.

The view that in the present case there was no requisition or taking under the power of eminent domain rests on the contention that where an "obligatory" order or requisition is issued under a statute authorizing the exercise of the power of eminent domain, the property owner to whom it is directed may not voluntarily deliver the property in obedience to the order, but must require the United States to come and take it, and that if he does indicate an "acceptance" or willingness to comply with the order, except as to the price suggested, and thereafter voluntarily delivers the merchandise to the United States, he has made a contract which limits him to the value as of the date of

delivery without interest thereon to the date of payment, whereas if he had stood fast and refused to comply with the order in any particular, and required the Government to send and seize his property, he would place himself in the better position of being entitled, in addition to the value as of the date of the taking, to interest thereon to the date of payment.

We have attempted in this memorandum not to argue the question, but to state it. The conclusion reached by the Court of Claims is not so obviously correct as to remove the question from the field of reasonable debate.

The question is one of importance affecting constitutional rights of citizens. Other cases involving the same problem are pending in the Court of Claims and in District Courts of the United States, and the case seems to be one which is worthy the consideration of this Court, and, under all the circumstances, the United States does not feel justified in opposing the issuance of the writ.

Respectfully submitted.

/ WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1926.

APPENDIX

The pertinent portions of the Act of March 4, 1917 (Ch. 180, 39 Stat. 1168, 1193), provide:

(b) That in time of war, or national emergency * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amount appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by

the President, the President may take immediate possession of any factory of any such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient. " " "

Third: To require the owner or occupier of any factory in which ships or war materials are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and within the limits of the amount specified, such material, to be used and disposed of as directed by such committee, and to make every effort to expedite the production of such material, and to make every effort to secure the same by the Government.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this *paragraph*, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any

factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States for recovery such further sum as added to said fifty per centum shall make up such amount as will in just compensation thereof, in the manner provided for by law, in the manner provided for by law, in the manner provided for by law, and persons are provided with being here in the National Code.

The provisions of the Act of June 1, 1917 (40 Stat. 238, 239, 240, 241), provide that:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

* * * * *

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of

the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(64) Compliance with any order issued under this act in carrying on any person or firm who, under a contract with the United States Government, is engaged in the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, as determined by the President, is unsatisfactory to the person entitled thereto, such person shall be paid the amount so determined by the President, and shall be entitled to recover such amount as may be determined by the President, in the manner provided for by paragraph twenty, and section one and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

* * *